Supreme Court, U.S.
FILED

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No.

In The Supreme Court of the United States October Term, 1993

Richard F. Sprague

Petitioner

v.

James B. King, Director of the Office of Personnel Management, an agency of the United States of America

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Richard F. Sprague
Pro Se, Petitioner
405 - 52nd Place
Western Springs, Illinois 60558
(708) 246-4640

ART 'N TYPE GROUP
(708) 356-5944

62 pp

QUESTIONS PRESENTED

Whether Judge Frank H. Easterbrook's Decision in this case demonstrated prejudice against the Grade 15, administrative law judges (ALJs) hearing and deciding Social Security cases by relying on irrelevant matters to make his decision conform to his pre-existing economic views which are outside of the record.

Whether the undisputed facts in this case warrant a clear decision in favor of the Grade 15, ALJs in Health and Human Services, Social Security Administration (HHS-SSA), based upon a proper statutory construction and reading of the whole act and legisiative history.

Whether this court should exercise its supervisory powers over Judge Frank H. Easterbrook, since he has developed a pattern and reputatuon for disregarding the facts, or law, to reach a conclusion and then working backwards (often outside the record) to justify his irrelevant economic views.

INTERESTED PARTIES

A. The following listed named plaintiffs were and are all ALJs with HHS-SSA hearing and deciding social security matters throughout the United States.

Richard F. Sprague	Charles N. Bono
William D. Boham	W. Howard O'Bryan, Jr.
J. Stanley Gill	Paul Harkey
James L. McElroy, Jr.	F. Joseph Wieman
John V. Evans	Sheldon L. Shepherd
Donald E. Marrs	Ralph L. Wampler
Gilbert Drucker	Mark W. Haase
John A. McMenamin	Joseph M. May
Rollie D. Thedford	James L. Garner
F. Neil Aschemeyer	Alan L. Jonas
David T. Hubbard	Maxwell Darks
Denton Gossett	Francis Mayhue
Francis J. O'Byrne	R Kerns B. Taylor

B. Over 750 other unnamed ALJs with HHS-SSA have an interest in the outcome of this case. They are located all over the United States and its territories.

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OPINION BELOW

The opinion of the Court of Appeals is entitled Richard F. Sprague, et. al. v. James B. King, Director of the Office of Personnel Management (7th Cir. 1994), and is reproduced as Appendix A at page 1a.

JURISDICTION

The judgement of the Court of Appeals for the Seventh Circuit was entered on April 28, 1994 (Appendix B at page 1b.) A petition for rehearing with suggestion for rehearing en banc was filed and was denied on July 5, 1994. This petition for certiorari was filed within 90 days of the entry of judgement.

STATUTE INVOLVED

5 U.S.C. Section 5372, is reproduced as Appendix C at page 1c.

REGULATIONS INVOLVED

5 C.F.R. Sections 930.204(b) and 930.210(d) and (g), are reproduced as Appendix D at page 1d.

STATEMENT OF THE CASE

Petitioner and the named and unnamed parties were all incumbent administrative law judges (ALJs) with HHS-SSA hearing and deciding social security matters. I am also an attorney admitted to practice before this court. There were almost 800 of these ALJs at the relevant times herein. If successful on the merits here, millions of dollars of back wages would be owed to them.

By way of preliminary history, for over 20 years the respondent, OPM, had classified the ALJs in HHS-SSA at a lower pay grade level than the ALJs who decided cases for the regulatory agencies. OPM justified this on the ground that the nature and complexity of the cases decided by the regulatory ALJs was greater than that of the ALJs with HHS-SSA. Therefore, these ALJs were placed at the lower Grade 15 pay level.

In recent years, the ALJs in HHS-SSA had requested OPM to change their pay classification and make them the same as the Grade 16, regulatory ALJs. The reason for the request was that they felt that the nature of their work had changed not only in quantity, but also in complexity. However, each time their requests were turned down by OPM.

Then, in about 1989, the ALJs in HHS-SSA took their request to Congress, which was working on a new comprehensive pay reform bill for most federal workers. Chairman Ackerman had composed a bill in the House Post Office and Civil Service Committee covering pay for the ALJs. In that bill, it provided for a number of pay levels for the ALJs, the exact conversion provision which is found in present ALJ pay bill in question (Section 5372), but kept OPM in the picture by providing that OPM could still distinguish between the ALJs by the nature and complexity of their work.

Representative Gilman was not satisfied with this bill. He then held hearings on this matter and testimony of some ALJs was taken. After this testimony, he believed that the bill should be amended and that all ALJs (present and future) should be treated the same for pay purposes. He said that the past reason for differentiating between the two classes of ALJs, because of the nature and complexity of their work, was a pretext and should be abandoned.

Representative Gilman then proposed an amendment to the Ackerman bill which was adopted by the House Committee. The amendment provided for three things. It provided for only three levels of pay for the ALJs; it put OPM out of the picture as to the issue in this case by taking away OPM's authority to differentiate between the ALJs by striking the words "nature and complexity" of the cases; and it left in the very conversion rule that was adopted by the joint committee in the final version of the bill.

On the other hand, OPM had Senators Roth and Glenn present their version of the new ALJ pay bill. It reserved to OPM the same discretion it always had, and included in the bill the right to distinguish between the ALJs for pay purposes based upon the nature and complexity of their cases.

These two competing bills were before the joint committee which passed its final bill (Section 5372), and is the bill in question. This new law adopted all three of the provisions of the Ackerman-Gilman Bill. It provided for only three ALJ pay classifications (AL 1, AL 2 and AL 3); it eliminated OPM's discretion to discriminate among the ALJs by failing to give OPM the right to distinguish between them based on the "nature and complexity" of their duties; and it retained the very conversion rule which is the heart of this matter.

The new law also required OPM to prescribe regulations necessary to administer this section. The controversy arises because of new implementing regulations passed by OPM in converting the incumbent Grade 15 ALJs to the new pay schedule. OPM converted them to a lower pay rate than the Grade 16, regulatory ALJs with the same length of service. OPM did so, as if the old law applied, and it had the right to continue distinguishing between the ALJs based upon the nature and complexity of their work.

OPM, in passing its implementing regulations; did not consider the type of work the ALJs supervised, the type of cases they decided, or which agency they work for; in placing ALJs for promotional purposes, placing ALJs into certain levels (AL 1, AL 2, or AL 3), or placing highly qualified new ALJs into higher rates. While there was no express prohibition in the new pay law concerning these matters, OPM knew that this was the purpose of the new law the same as if there was an express prohibition. However, the distinction was made when OPM converted the ALJs in HHS-SSA to the new AL 3 pay scale, and this is the issue here.

The ALJs with HHS-SSA believe that the new conversion regulations contravened the intent of the statute when the whole statute is properly construed. They believe that while the conversion provision in the statute gave OPM certain discretion to place the ALJs in the new pay scale, there were two things that it could not do; namely pay an ALJ less than before and continue its discrimination against the ALJs with HHS-SSA. One of these limitations was expressly stated, and the other was clearly implied when the totality of the circumstances (plain wording of the entire act, and its legislative history) are properly taken into consideration. The ALJs with HHS-SSA strongly contend that they should have been placed on the new pay scale with the regulatory ALJs having the same length of service based upon a proper statutory construction.

The ALJs with HHS-SSA filed a lawsuit in the U. S. District Court. OPM filed a motion to dismiss on the ground that the conversion of the ALJs to the new pay scale was committed to its sole discretion. The District Court agreed and dismissed the cause of action.

The ALJs with HHS-SSA appealed the dismissal. Judge Easterbrook and two other judges affirmed the dismissal. I have now petitioned this court for a writ of certiorari to be granted based upon Judge Easterbrook's unjudicial and prejudicial decision which was based upon irrelevant matters to justify his preconceived views. It is also requested that this court exercise its supervisory powers over Judge Easterbrook, since he has a history of deciding matters in this fashion.

I. REASONS FOR GRANTING THE WRIT

A.

Prejudice

(1) This is a very simple case involving statutory construction. The statute should be compared with regulations to see if they are compatible. The purpose of the statute, its plain wording and implications, the conversion provision and legislative history are involved; and not whether Congress had made the right decision.

Judge Easterbrook's opinion did not fairly consider these relevant factors. Little consideration was given to the real issues in the case, except incidentally, and by way of banter. His bias against the ALJs in HSS-SSA so tainted his judgment that justice demands that it be set aside and reconsidered. His "inexorable" logic is fraught with faulty, false and inappropriate premises and comparisons. Moreover, it betrays a reliance on, and is clearly driven by, preconceived notions and ideologies that have nothing to do with the legal question involved.

Judge Easterbrook did his utmost to belittle the ALJs in HHS-SSA. This prejudice, no doubt, influenced his ultimate decision in this case. He stated how minor and easy their duties were, as opposed to the more complicated work of the regulatory ALJs.

At page 2 of his slip opinion Judge Easterbrook states:

"...[A]n ALJ at the FTC might work on complex mergers, conducting year-long trials and writing detailed opinions; an ALJ at HHS would take medical evidence in a brief hearing from oft-unrepresented claimants and write brief, largely formulaic, opinions..."

This must be his preconceived opinion, since it does not appear in the record of the case. However, he does cite Antonin Scalia, The ALJ Fiasco - A Reprise, 47U. Chi L. Rev. 57,62-80 (1979). This is an outdated paper which has nothing to do with the issues, except to illustrate Judge Easterbrook's prejudice against the ALJs in HHS-SSA.

Judge Easterbrook is in error in his observations. Things have changed. Now, most of the claimants are represented. Some of our cases are lengthy, hotly contested, require expert testimony and involve complex legal technicalities. This was noticed by this court in the recent case of Sullivan v. Zebley, 493 US 521 (1990), which involved supplemental security income disability claims involving children.

We are, and have been, in constant turmoil with the agency that employs us. The agency pushes "numbers over fairness" due to a great backlog of cases. The agency controls our staffs and wants to control the hearing process. We have filed a number of lawsuits against the agency and have testified in Congress as to these abuses. The job of the ALJs in HHS-SSA has dramatically changed in the last 20 years and especially

so in the last 10 years. That was why Congress put us on equal pay footing with the other ALJs by passing the new pay statute.

But all of this is irrelevant, because Congress has acted to abolish the pay differences among the ALJs. Congress has made us all one based on the length of service. Judge Easterbrook not only questions this, but obviously disagrees with the choice made by Congress. This seems to be the controlling factor in his decision. Whether Congress made the right or wrong decision is irrelevant. It is enough to say that Congress made the choice and had the power to do so. Judge Easterbrook should have honored and enforced that choice.

(2) Judge Easterbrook's bias is shown by his unwillingness to correctly and fully state the plaintiffs' positions in this case. In fact, he failed to really even respond to the relevant arguments and issues in the case. He failed to answer the plaintiffs' argument that the main purpose of the new legislation was not just to provide a pay raise, but to completely revamp the ALJ pay system by abolishing any pay discrimination against the ALJs in HHS-SSA which had existed for over 20 years. It created a single class of ALJs, for both the past and present judges.

Judge Easterbrook misstates the position of the ALJs when he said at page 5 of the slip opinion:

"[P]laintiffs say that the statute creates an additional rule: the OPM must give each ALJ the level and rate he would enjoy today had the new system been put into force years ago..."

This is not the position of the incumbent ALJs. What we are saying is that we must be placed at the same level and rate as the regulatory ALJs <u>according to the length of service</u>, regardless of the agency involved, or prior pay placements which existed under the old pay schedule. This is the plain purpose of the new pay act.

(Pages 2, 16 of plaintiffs' complaint). This applies to the old and new judges appointed under the new law.

Judge Easterbrook also misstated our argument on page 4 of the slip opinion when he said:

"[P]laintiffs' argument rests on their belief that the work of ALJs at HHS is equivalent to the work of ALJs elsewhere...."

This is not, and has not, been our argument. Congress has already determined this. This makes any consideration of the equivalency of work an irrelevancy under the new pay act. This is a moot point.

(3) Judge Easterbrook denigrates the legislative history by merely stating conclusions, and discussing only half of it. He did not completely examine it. He shortshrifts it by stating that it is "thin gruel." Before being repulsed by this "thin gruel" one would expect, at a minimum, that Judge Easterbrook would at least run the spoon of legal reasoning and analysis through the whole mixture to determine its substance and consistency. Clever analogy is an easier and more expedient alternative. By this method, he has turned this case into a "thin mismash."

We did not just rely upon mere statements of some individual members of the House, but much, much more as stated below at page 9 of our Reply Brief. The Ackerman House Bill was modified by the Gilman Amendment which deleted language, and showed clearly that there would be no pay distinctions among ALJs of comparable periods of service. It made clear that there would be no distinction between present and future ALJs. This bill also contained the very conversion rule which was ultimately incorporated into the new pay bill, and it is that provision which is at the very heart of this case. It cannot be reasonably argued that the Ackerman-Gilman Bill intended to continue the distinctions among

the incumbent ALJs, which were deleted by this very amendment.

Then the Senate's Glenn-Roth Bill, which was favored by OPM; and the Ackerman-Gilman Bill, went to the joint House/Senate Committee which enacted the new bill. The Ackerman-Gilman Bill prevailed, and OPM no longer had the authority to do what it had been doing for more than 20 years. A fair reading of this clear legislative history supports our position. Legislative history rarely becomes more weighty than that.

(4) Judge Easterbrook resorted to judicial legislation to support his biased opinion. This is not only judicial legislation, but a totally improper reading of the portion of the statute which relates to the appointment of new ALJs at an advanced rate.

At page 5 of the slip opinion he states:

"[I]ndeed, nothing in Section 5372 would stop the OPM from continuing the practice of starting the ALJs in HHS at lower salaries than the ALJs in other agencies..."

He points out that the new law says that the agency may do so "under circumstances as the Office may determine appropriate." His twisted interpretation is contrary to the main purpose of the act, which abolished this type of distinction as to new appointments. This would not be appropriate under the act. He completely disregards this. He reverts to the old pay law which Congress abolished in its new legislation.

OPM's new implementing regulations recognized this obvious fact. 5 C.F.R.§930.210(g). (Appendix D). These regulations state that only applicants who have prior federal experience, or have had superior qualifications before the hiring agencies, can be paid at an advanced rate. These provisions are open to all agencies, regardless of the nature of its work. These provisions are

open to HHS-Social Security judges, as well as to all other agencies and individual applicants. This means that an ALJ with HHS could be paid at an advanced rate over a less qualified ALJ at the SEC, and vice versa. (See: Supplemental Brief of Appellants filed after the oral arguments).

This was OPM's interpretation of what were "appropriate circumstances" under the new act. Appropriate circumstances mean only those that are consistent with the purpose of the act. So there is no proper way for OPM to do what Judge Easterbrook suggests, by way of obiter dicta, without violating the clear purpose of the act.

(5) Judge Easterbrook's gratuitous statements concerning market forces, saving the public money, complimenting federal managers for excessive devotion to taxpayers' interests and emphasizing that everyone got a raise; are matters which are totally irrelevant to the issues in this case. However, these factors do provide some insight into the real reasons for the ruling. He obviously decided this case based upon his economic notions, and his considerations of fiscal restraint. These have nothing to do with the issues. These were properly before Congress, but not here. The same can be said for his notion that we are second rate ALJs, not worthy of equal pay treatment with the regulatory ALJs. Judge Flaum, in his concurring opinion, while saying he supported Judge Easterbrook, had to admit that he had some reservations about Judge Easterbrook's far reaching and irrelevant verbiage.

B.

The Merits

When the merits of this case are reasonably considered under proper statutory construction standards, only one conclusion case can be reached; that Congress intended that all ALJs, present and past, should be given pay increases based on their length of service, and not on the nature and complexity of their cases, or which agency they work for.

When Congress passed the new ALJ pay law, it made no distinction between ALJs no matter which agency they worked for, or what cases they decided. This was a revolutionary change. No longer could OPM distinguish between the ALJs in HHS-SSA, and the regulatory ALJs, based upon the nature and complexity of their work. This is the plain wording and implication of the new law.

The conversion rule in the new act linked all ALJs together in making the conversion pay adjustments. No distinction was made. While it is true that the only express limitation was that they couldn't be paid less, it was implicit in the new pay law that OPM could no longer discriminate between the two classes of ALJs as OPM had done for over 20 years. To fail to read this obvious limitation into the conversion rule would be to torture and strangle the intent of Congress. It would mean that a new ALJ in HHS-SSA would be treated equally with the regulatory ALJs, but an incumbent ALJ would not; even though the work of such an incumbent ALJ just prior to the new law would have been exactly the same as that of the newly appointed ALJ in HHS-SSA. This would have been obviously an unfair result not intended by Congress.

Secondarily, OPM has converted and promoted the incumbent and new Hearing Office Chief ALJs of HHS-SSA, and in other agencies, to a rate which is one rate higher based upon their office managerial and administrative duties. This is based upon new regulation 5 C.F.R. §930.204(b). Again, this has nothing to do with what agency they work for. They are all treated alike under the new implementing regulations.

Also, the new implementing regulations treat all new supervising chief and deputy ALJs the same, regardless of which agency they are with. The only requirement is that their duties "involve significant administrative and managerial responsibilities." 5 C.F.R §930.210(d).(Appendix D). This is exactly what Representative Gilman expected in his amendment that provided for only three levels of ALJs, and was not conditioned upon which agency the chief or deputy chief ALJ worked for. This provision was adopted in the new pay law.

The new implementing regulation for paying new ALJs at an advanced rate, also does not take into consideration which agency the ALJ will work for, or what his duties will be. 5 C.F.R. §930.210(g).(Appendix D). The advanced rate depends upon the federal experience, and qualifications, of the individual applicants and not the type of cases that the ALJs handled, or the agency involved. This limitation was not expressly spelled out in the new act, and it did not have to be because it was obvious. It was implicit on a fair reading of the entire act, the same as in the conversion provision in question.

The only deviation from this by OPM in their implementing regulations was for the incumbent ALJ in HHS-SSA which is the center of the controversy. OPM disregarded the obvious intent of Congress, and reverted to the way it had been doing business for over 20 years. OPM's feeble excuse was that the conversion provision didn't prohibit them from doing so because it

didn't expressly say so. This is against the implicit intent of Congress, and the legislative history. The Joint Committee of Congress agreed with Representative Gilman's amendment taking OPM out of the picture in this regard, and left in the Ackerman-Gilman conversion provision. While this gave OPM discretion as to where to place all the incumbent ALJs under the new pay plan, according to length of service; it certainly did not give OPM the right to continue to discriminate against the ALJs in HHS-SSA which it had done for more than 20 years.

C.

Pattern

(1) Judge Easterbrook has developed a pattern of deciding cases not based upon the facts or law, but on his preconceived economic notions which are not of record, and are irrelevant.

The Chicago Council of Lawyers made this point quite clear in its recent, 1994, evaluation of Judge Easterbrook. It stated in part therein (Appendix E):

"Judge Easterbrook has also been criticized for mischaracterizing the record below in order to reach certain results.[114] The Council received this complaint from attorneys, and it was recently made by Judge Cummings. See Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355,365 (7th Cir. 1992)(Cummings, J., concurring)(criticizing Judge Easterbrook's dissenting opinion). In Wilcon, a diversity case, Judge Cummings wrote that

> the dissent's mischaracterization of the facts, misstatement of the public policy at issue, and misapplication of Wisconsin precedent compels me to write a brief response .... It is striking how little this imagined scenario [set forth by Judge Easterbrook] resembles the actual facts presented in the parties' stipulated joint appendix.

Id. at 365.[115]

...Judge Easterbrook has been perceived as selecting a result consistent with his views of economic efficiency and then working backwards, and often outside the record, to reach the result.[103] As a consequence, Judge Easterbrook's result in many cases appears to be based on unproven factual assumptions or hypotheses not obtained from the record in the case, but instead from his own assumptions about how a market or a transaction should work, or similar economic analysis. This approach quite properly infuriates lawyers. It deprives them of a chance to prove their case, to brief the case law, and even to challenge the factual presentation of expert opinion (which Judge Easterbrook, in effect, unilaterally introduces into his opinion as extra-record, and hence unrebuttable 'fact'). This problem is perhaps most prominent in Judge Easterbrook's opinions in significant corporate and securities cases.

For example, in Flamm v. Eberstadt, 814 F.2d 1169, 1173-1174 (7th Cir.), cert. denied, 484 U.S. 853 (1987), Judge Easterbrook, after first citing a wealth of literature from the 'Chicago school' of law and economics, concluded in accordance with his own law review article that since management's 'silence pending settlement of ... a deal is beneficial to most investors, most of the time,' the failure to disclose pending deals is immaterial as a matter of law and economic policy. See also Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611 (1985). Shortly thereafter, in Basic Inc. v. Levinson, 485 U.S. 224, 235 n. 11 (1988), the Supreme Court expressly criticized Judge Easterbrook's opinion in Flamm for '[r]easoning backwards from a goal of economic efficiency' to achieve the result reached there....[104]

Another example is Judge Easterbrook's opinion in Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338 (7th Cir. 1990), rev'd, 111 S. Ct. 1711 (1991). In Kamen, Judge Easterbrook confronted the narrow issue whether the District Court erred in dismissing a shareholder derivative action for failure to plead with sufficient particularity facts excusing 'demand' on the board of directors. 111 S. Ct. at 1713. Rather than address that issue, however, Judge Easterbrook expressly overrruled Seventh Circuit precedent holding that the issue was governed by state corporate law, and concluded that, as a matter of economic policy, the requirement of making 'demand' should never be excused. 908 F.2d at 1343-1347. Judge Easterbrook justified his power to use economic policy to create a universal demand requirement by arguing that the issue of demand was governed by federal common law. ld at 1342.[106]

The Supreme Court unanimously reversed Judge Easterbrook's opinion. Suggesting that Judge Easterbrook's decision was a call for 'legal reform,' the Supreme Court concluded that he had engaged in a 'quantum of federal common lawmaking' that exceeds his power as a federal judge. 111 S. Ct. at 1720. The Supreme Court found Judge Easterbrook's refusal to accept the appellant's argument for the application of Maryland law particularly ironic given that neither party ever argued that federal common law should apply. 111 S. Ct. at 1718. Moreover, the Supreme Court chided Judge Easterbrook for writing an opinion that contains little more than elaborate dictum: 'the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided.' 111 S. Ct. at 1718 n.5. According to the Supreme Court, Judge Easterbrook effectively had exploited the posture of the case and exceeded this power as a judge in order to create a federal law of universal demand consonant with his

economic philosophy: 'The Court of Appeals erred by fashioning a uniform federal common law rule....' 111 S. Ct. at 1723....

Nor are the cases in the securities field the only area in which Judge Easterbrook appears to rely in large part on assumptions about economic efficiency taken from outside the record. See, e.g., Merk v. Jewel Food Stores, 945 F.2d 889, 898-99 nn.3-4 (7th Cir. 1991) (majority criticizes Judge Easterbrook's dissent for relying on unsupported assertion about economic motives and for ignoring and mischaracterizing controlling precedent), cert. denied, 112 S. Ct. 1951 (1992). See also United States v. Mount, 966 F.2d 262 (7th Cir. 1992)(applying economic analysis to baseball).[107]....

In addition, Judge Easterbrook's opinions have been criticized for not accurately reflecting the record or controlling precedent. Several attorneys have gone as far as to state that Judge Easterbrook's use of precedent is unreliable. This position is supported by several opinions critical of Judge Easterbrook.

One example of an opinion by Judge Easterbrook that was criticized as omitting controlling precedent is Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986). In Will, Judge Easterbrook stated that a plaintiff alleging that the purchase of one product was illegally tied to a second product must show a danger of the seller obtaining market power or a potential monopoly in the market of the second, tied product. 776 F.2d at 673. Less than a year earlier, however, that position had been rejected by a 5-4 United States Supreme Court opinion in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). Judge Easterbrook was certainly aware of the position in Jefferson Hospital, as he had been counsel to Jefferson Hospital in that case before the Supreme Court. In a subsequent opinion by Judge Cudahy, joined by Chief

Judge Bauer and Judge Ripple, in Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 716-19 (7th Cir. 1987), the Court noted that Judge Easterbrook's prior opinion in Will 'apparently misstates the law.'

It is not unusual for Judge Easterbrook to refer in a later opinion to his own extensive and free-wheeling dicta as either controlling precedent or creating an open question when the issue that he has foreshadowed actually does present itself in a case before him....

In conclusion it was stated: ...All too often, particularly when he disregards the facts or the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and his diversions from the facts and the law."

(2) I ask this court to exercise its supervisory authority as it did against Judge Cameron of the Court of Appeals for the 5th Circuit in civil rights cases. It seems that a greater authority is needed to stop Judge Easterbrook than can be provided by the 7th Circuit Court of Appeals. 7 Race Rel. L. Rep. 741-46 (1962).

CONCLUSION

For these reasons, a writ of certiorari should be granted to review and ultimately reverse the decision below; and to exercise this court's supervisory powers over Judge Easterbrook.

Respectfully submitted,

Richard F. Sprague, Pro Se,
Plaintiff, Appellant & Attorney
405 - 52nd Place
Western Springs, Illinois 60558
(708) 246-4640

APPENDICES

Appendix A

In The United States Court of Appeals for the Seventh Circuit

No. 93-2755
Richard F. Sprague, et al.,

Plaintiffs-Appellants,

v.

James B. King, Director of the
Office of Personnel Management,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 7263-Charles R. Norgle, Sr., Judge.

Argued February 23, 1994 - Decided April 27, 1994

Before FLAUM and EASTERBROOK, *Circuit Judges,* and MILLER, *District Judge.**

EASTERBROOK, *Circuit Judge.* Most federal administrative law judges serve in the Department of Health and Human Services, resolving claims to federal benefits. Until recently these ALJs began their service at pay level GS-15 and, although they could advance to higher steps of that pay level, could not advance to higher levels. Administrative law judges at most other agencies, such as the FCC or FTC, began service at GS-16. Federal officials who set pay believed this difference in pay appropriate in light of the different tasks involved. An ALJ at the FTC might work on complex mergers, conducting year-long trials and writing detailed opinions; an ALJ at HHS would take medical evidence in a brief hearing from oft-unrepresented claimants and write brief, largely formulaic, opinions.

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*Hon. Robert L. Miller, Jr., of the Northern District of Indiana, sitting by designation.

The difference grated on the ALJs at HHS, and they resolved to do something about it. Because a majority of all ALJs work at HHS (780 out of approximately 1,100), they dominate the association of federal ALJs, which asked Congress to eliminate the pay differential. For years nothing happened. But when Congress took up a larger package of proposals concerning pay in the federal service, the ALJs found some sympathetic ears. By the time the shouting was over, the differential was gone - and a lot of other changes had been made to boot. An amendment to the Federal Employees Pay Comparability Act in 1990 removes ALJs from the General Schedule and establishes three grades reserved for ALJs: AL-1, AL-2, and AL-3. 5 U.S.C. §5372. A new ALJ starts at AL-3, which has six "rates," A through F. As the ALJs acquire experience they progress from Rate A, which pays 65% of the rate of basic pay for Level IV of the Executive Schedule, to Rate F, at 90% of Level IV. Criteria other than longevity pay little or no role in advancement. 5 U.S.C. §5372(b)(3)(A); 5 C.F.R. §930.210(d). Grades AL-2 and AL-3, for supervisory ALJs, pay 95% and 100% of the Level IV amount. The new statute not only eliminates the pay differential among ALJs but also substantially increases the maximum pay that ALJs may attain.

Like any other change in the law, this one required a transition provision. How would the existing corps of ALJs be transferred into the new system? The ALJs asked Congress to require the Office of Personnel Management to determine the pay level each incumbent would have attained had the new system been in force for his entire career, and to place him in that grade and rate. Some Members of Congress made statements in support of that approach; OPM opposed it. The text that emerged from the give-and-take of politics provided simply: "In making initial pay adjustments for administrative law judges after [the package of amend-

ments], the rate of basic pay for any such judge shall, upon conversion to the new pay system, be at least equal to the rate which was payable to that individual immediately before such conversion." Section 104(e) of Pub. L. 101-509, 104 Stat. 1447 (1990), reprinted as 5 U.S.C. (1988 ed. Supp. III) §5372 note. The OPM then issued a regulation placing each ALJ at the lowest grade and rate in the new schedule that exceeded the current pay, yielding this table of conversions:

General Schedule	AL
GS-15, Steps 1-2-3-4	AL-3, Rate A
GS-15, Steps 5-6	AL-3, Rate B
GS-15, Steps 7-8-9	AL-3, Rate C
GS-15, Steps 10	AL-3, Rate D
GS-16, Steps 1-2-3	AL-3, Rate C
GS-16, Steps 4-5-6	AL-3, Rate D
GS-16, Steps 7-8	AL-3, Rate E
GS-16, Step 9	AL-3, Rate F
GS-17, Steps 1-5	AL-2
GS-18	AL-1

5 C.F.R. §930.21(k). This transition, which took effect in February 1991, meant that senior ALJs at HHS moved to AL-3, Rate C, the same as spanking new ALJs at the NLRB and most other agencies. Junior ALJs at HHS began at Rate A, and they were doomed to stay behind the ALJs from other agencies until the passage of time brought all to AL-3, Rate F. Persons who started in AL-3, Rate C would reach this plateau in five years; those 6 2 who began in AL-3, Rate A, would take seven. Thus the OPM's transition rule means that until 1998 some of the ALJs at HHS will receive less pay, holding seniority constant, than ALJs at other agencies. Twenty-six ALJs filed this suit under the Administrative Procedures Act, contending that OPM violated the 1990 amendments, and acted arbitrarily, in devising this transition rule. The

district court concluded that the OPM's decision is unreviewable, because committed to agency discretion by law, 5 U.S.C. 701(a)(2), and dismissed the suit. 825 F. Supp. 1324 (N.D. Ill. 1993).

Although it defends the district court's rationale, the OPM also argues that its decision is indeed reviewable, but under the civil service laws rather than the APA. Plaintiffs' argument rests on their belief that the work of ALJs at HHS is equivalent to the work of ALJs elsewhere - that this proposition is true as a matter of fact, and that Congress recognized as much when it enacted §5372. According to plaintiffs, this equivalence makes the OPM's transition rule arbitrary. A claim that "[e]qual pay should be provided for work of equal value" is well established in federal law; the phrase we have quoted appears in 5 U.S.C. §2301(b)(3), part of the Civil Service Reform Act of 1978. Equally well established is the means of vindicating this right: a complaint to the Merit System Protection Board, followed by judicial review in the federal circuit. 5 U.S.C. §§1214(c), 7703(b). This is not just an optional system of review; it is the exclusive system. *United States v. Fausto*, 484 U.S. 439 (1988).

OPM missed the boat in the district court, neglecting to mention the role of the MSPB and the provisions for review of its decisions. That omission is fatal in light of *Air Courier Conference v. Postal Workers Union*, 498 U.S. 517, 522-23 & n.3 (1991). There the Court held that another restriction on the scope of review under the APA was not jurisdictional and thus could be forfeited when the agency failed to bring the limitation to judicial attention. Plaintiffs have raised a federal claim, so we have subject-matter jurisdiction under 28 U.S.C. §1331; and the fact (if it is a fact) that a statute directs claims of this kind to the federal circuit rather than to the district courts and regional courts of appeals, is more in the nature of a

venue rule (coupled with an obligation to exhaust administrative remedies) than of a limitation on jurisdiction. As in *Air Courier Conference* the agency waited too long to present its argument. We shall decide this case under the APA – without implying one way or the other whether this is the appropriate route for future cases. *Kamen v. Kemper Financial Services Inc.*, 111 S. Ct. 1711, 1718 n.5 (1991). (Plaintiffs attempt to escape *Fausto* by relying on 5 U.S.C. §1222, which was enacted in 1989. Whether that statute permits federal employees to obtain review under the APA is a subject we need not consider. See *Gergick v. Austin*, 997 F.2d 1237 (8th Cir. 1993); *Rivera v. United States*, 924 F.2d 948, 952-54 (9th Cir. 1991).)

The OPM insists that there is no law to apply and that the transition decision is therefore committed to its discretion. True enough, the statutory transition rule is sketchy, but it affords *some* law to apply. OPM could not reduce any ALJs salary; an ALJ who suffered a pay cut during the transition could obtain relief. (Whether under the APA or under the Civil Service Reform Act we need not say – a qualification we shall stop repeating.) Plaintiffs say that the statute creates an additional rule: the OPM must give each ALJ the level and rate he would enjoy today had the new system been put into force years ago. If this is indeed the meaning of the transition statute, then the OPM has deprived plaintiffs of their due; *whether* it is the meaning of the statute is a question of law. Only if we decide it adversely to plaintiffs is there "no law to apply"; but then the conclusion that the selection of a transition rule has been committed to agency discretion will reflect a decision on the merits rather than a conclusion that the subject is not reviewable. "No law to apply" is shorthand for a conclusion that Congress has given the agency discretion without creating benchmarks by which a court may assess its exercise. *Lincoln v. Vigil*, 113 S. Ct. 2024, 2030-31 (1993); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Incantation of the

phrase does not permit a court to leap over the legal question: How much discretion does the agency possess? See Cass R. Sunstein, *Reviewing Agency Inaction After Hecker v. Chaney*, 52 U. Chi. L. Rev. 653 (1985).

Congress told the OPM to establish a transition rule. It established only one restriction: no one could come out of the move with a lower salary. Nothing in §5372 itself implies any greater limit on the scope of permissible choice. Section 5372 does not say that all ALJs shall be paid strictly according to seniority. It establishes a system of progression by longevity, §5372(b)(3)(A), but this rule applies only "[u]pon appointment" to an AL-3 position. Indeed, nothing in §5372 would stop the OPM from continuing the practice of starting the ALJs in HHS at lower salaries than the ALJs in other agencies. Section 5372(b)(3)(B) provides that "[t]he Office of Personnel Management may provide for appointment of an administrative law judge in AL-3 at an advanced rate under such circumstances as the Office may determine appropriate." So if the OPM were to decide that it is "appropriate" to appoint beginning ALJs at the SEC to AL-3, Rate D, and beginning ALJs at HHS to AL-3, Rate A, nothing in the statute would bar the door. Market forces could make such a decision look very attractive. The SEC wants lawyers with securities experience, and such persons have higher-paying opportunities in the private sector. After seven years on the job all ALJs in every agency would reach AL-3, Rate F; Congress thus determined that the *terminal* salaries of ALJs should not vary by agency; but the fixing of *initial* salaries has been left to the OPM. (The OPM's current regulations do not distinguish by agency for new appointments; our point is not that the OPM has made a decision that such a difference is "appropriate" but that Congress left it the discretion to do so.)

What plaintiffs offer in response is legislative history. A description of the kind of material on which plaintiffs rely is enough to show its irrelevance. They offer not committee reports and other explanations of the text Congress enacted, but statements on the floor (and in committee meetings) by individual Members of the House supporting proposals and amendments that were not enacted. We see no need to digest this thin gruel. The statutory text is plain enough as is. It may be that the statements to which the ALJs point show that several powerful members of Congress very much wanted the OPM to act differently, but wishes are neither fishes nor laws. "Congress may always circumscribe agency discretion ... by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history) ... And, of course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences." *Lincoln*, 113 Ct. at 2032. But those consequences are delivered through the political process. "[T]he remedy for noncompliance with the admonition is in the hands of the body that issued it." *American Hospital Association v. NLRB*, 499 U.S. 606, 617 (1991).

As for the plaintiff's submission that the conversion rule is "arbitrary" because based on the "discredited" distinction between the ALJs at HHS and those elsewhere: §5372 does not "discredit" the old rule but establishes a new one for the future. It is not arbitrary to make haste slowly. Retarding implementation of the higher levels of pay saves the public money, and it is hard to fault federal managers for excessive devotion to taxpayers' interests. Everyone got a raise; how much of a raise, how fast, is a managerial rather than judicial decision. Cf. Antonin Scalia, *The ALJ Fiasco- A Reprise*, 47 U. Chi. L. Rev. 57, 62-80 (1979). Whether a longer period of transition serves the public interest is precisely

the kind of question that *is* committed to the OPM's discretion. There is no one right or just wage, and it was not "arbitrary" for the OPM to conclude that ALJs who had been willing to work for GS-15 wages must settle for an immediate raise and the prospect of an escalator to a much higher salary.

AFFIRMED

FLAUM, *Circuit Judge*, concurring. Judge Easterbrook has written an authoritative opinion that I join. I write separately not to address any deficiencies in the foregoing legal analysis - indeed, to my mind, there are none. Rather, I write simply to underscore a point that may appear understated in light of the framing of the issue presented here and the inexorable result we reached. As the linchpin of a vast network of agency decision-making, the oft-times heavily burdened and undervalued administrative law judiciary assumes duties and responsibilities that are functionally comparable to those of Article III judges. *See Butz v. Economou*, 438 U.S. 478, 513-514 (1978); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953). As the opinion points out, *ante* at 4, plaintiffs argument here rests on their belief that the work of ALJs at HHS is equivalent to work of ALJs elsewhere. Of course, it is not our role to resolve this question as an empirical matter and our decision today in no way should be read as doing so.

A true Copy:

Teste:

Clerk of the United States Court of
& Appeals for the Seventh Circuit

Appendix B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: April 28, 1994

BEFORE: **Honorable** JOEL M. FLAUM,
Circuit Judge

Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable ROBERT L. MILLER, JR.,
District Judge*

No. 93-2755
RICHARD F. SPRAGUE, WILLIAM D. BOHAM, J. STANLEY GILL, et al.,

Plaintiffs - Appellants

v.

JAMES B. KING, Director of Office of Personnel Management,

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division
No. 92 C 7263, Charles R. Norgle, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on April 27, 1994.

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*Hon. Robert L. Miller, Jr., of the Northern District of Indiana, sitting by designation.

Appendix C
5 USC Section 5372

"5377. Pay authority for critical positions."

SSC 104. ADMINISTRATIVE LAW JUDGES AND CONTRACT APPEALS BOARD MEMBERS.

(a) Pay Provisions. – (1) Section 5372 of title 5, United States Code, is amended to read as follows"

"§5372. Administrative law judges

"(a) For the purpose of this section, the term "administrative law judge" means an administrative law judge appointed under section 3105.

"(b)(1) There shall be 3 levels of basic pay for administrative law judges (designated as AL-1, 2, and 3, respectively), and each such judge shall be paid at 1 of those levels, in accordance with the provisions of this section. The rates of basic pay for those levels shall be as follows:

AL-3, rate A	65 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-3, rate B	70 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-3, rate C	75 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-3 rate E	80 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-3, rate F	90 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-2	95 percent of the rate of basic pay for Level IV of the Executive Schedule.
AL-1	The rate of basic pay for Level IV of the Executive Schedule.

"(2) The Office of Personnel Management shall determine, in accordance with procedures which the Office shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level.

"(3)(A) Upon appointment to a position in AL-3, an administrative law judge shall be paid at rate A of AL-3, and shall be advanced successively to rates B, C, and D of that level upon completion of 52 weeks of service in the next lower rate, and to rates E and F of that level upon completion of 104 weeks of service in the next lower rate.

"(B) The Office of Personnel Management may provide for appointment of an administrative law judge in AL-3 at an advanced rate under such circumstances as the Office may determine appropriate.

"(c) The Office of Personnel Management shall prescribe regulations necessary to administer this section"....

(e) CONVERSION RULE for ALJs. - In making initial pay adjustments for administrative law judges after this section and the amendments made by this section take effect, the rate of basic pay for any such judge shall, upon conversion to the new pay system, be at least equal to the rate which was payable to that individual immediately before such conversion.

Appendix D

5 CFR Section 930.204

(a) When OPM places an occupied administrative law judge position at a higher level, OPM will direct the promotion of the incumbent administrative law judge. The promotion will be effective on the date named by OPM.

(b) When OPM places one of an agency's administrative law judge positions at a higher level on the basis of the position's managerial and administrative nature, an agency may promote one of its administrative law judges to such a position, provided the selection and/or promotion is in accordance with regular civil service procedures.

5 CFR Section 930.210(d) & (g)

(d) Subject to the approval of OPM, agencies may establish administrative law judge positions at pay levels AL-2 and AL-1. Administrative law judge positions may be placed at such levels when they involve significant administrative and managerial responsibilities ...

(g) Upon appointment to a position at AL-3, an administrative law judge will be paid at the minimum rate A, unless the administrative law judge is eligible for a higher rate B, C. D. E, or F because of prior service or superior qualifications, as follows -

(1) An agency may offer an administrative law judge applicant with prior Federal service a higher than minimum rate, without obtaining the prior approval of OPM in order to pay the rate that is next above the applicant's highest previous Federal rate of pay, up to the maximum rate F.

(2) An agency may offer an administrative law judge applicant with superior qualifications a higher than minimum rate if it first obtains approval from OPM to offer such a higher rate to an applicant who is within reach on a certificate of eligible administrative law judge applicants in order to pay that rate of pay that is next above the applicant's existing pay or earnings up to the maximum rate F."Superior qualifications" for applicants includes having legal practice before the hiring agency, having practice in another forum with legal issues of concern to the hiring agency, or having an outstanding reputation among others in the field. OPM will approve such payment of higher than minimum rates for applicants with superior qualifications only when it is clearly necessary to meet the needs of the Government...

Appendix E

This is the first evaluation the Chicago Council of Lawyers has conducted of the United States Court of Appeals for the Seventh Circuit.

A. Reasons for Conducting this Evaluation.

The Chicago Council of Lawyers is a public-interest bar association, founded in 1969. It has 1,400 members, and is a member bar of the American Bar Association. The Council's members predominantly are lawyers at large firms, as well as small firm lawyers, prosecutors and defense lawyers, academics, judges, and members of Chicago's legal aid and civil rights bar. The Council was founded because of a concern by a wide variety of lawyers that other local bar associations were unwilling to criticize sitting judges, and were too parochial in their interests.[1]

Since its inception, the Council has evaluated candidates for selection to state and federal trial and appellate courts. The Council worked closely with former Senators Charles Percy and Adlai E. Stevenson, III in evaluating candidates for the federal bench in Chicago. We have continued to evaluate candidates to the federal bench in Chicago during the past decade.

The Council has also conducted four evaluations of the entire U.S. District Court for the Northern District of Illinois, most recently in 1991. The Council found that its District Court evaluations have been useful to the bar by publicly identifying the strengths, weaknesses, and practices of the judges. In addition, the Council believes its evaluations helped the District

[1] Among the Council's founding members were some of the most prominent lawyers in the City, including William Brackett, Kermit Coleman, Alex Elson, Albert E. Jenner, Jr., Alexander Polikoff, and Milton Shadur, as well as academics, including Gerhart Casper, David Currie, Philip Kurland and Dallin Oaks.

court by articulating problems perceived by the bar, as well as by letting judges know that good work was appreciated. Our 1991 evaluation also described characteristics shared by successful judges, as a guide in selecting future judges. That work was helpful in evaluating candidates for recent vacancies on the U.S. District court in Chicago.

Upon completion of the 1991 District Court evaluation, the Council's Board of Governors approved an evaluation of the Seventh Circuit Court of Appeals. The Council's decision was based on several factors. First, the U.S. Court of Appeals is a very important institution for practitioners and litigants in Chicago. It has also become one of the most distinctive courts in the country. Second, to our knowledge, no U.S. Court of Appeals (including the Seventh Circuit) has even been the subject of a detailed evaluation of its performance conducted by a bar association...

Frank H. Easterbrook

Frank H. Easterbrook, 45, is a 1973 graduate of the University of Chicago Law School. Judge Easterbrook was an assistant and deputy solicitor general from 1974 to 1979, a University of Chicago law professor from 1978 to 1985, and a principal of Lexecon, an economic consulting firm co-founded by Chief Judge Posner, from 1980 to 1985. President Reagan appointed Judge Easterbrook to the Seventh Circuit in 1985. From 1982 to 1991, Judge Easterbrook was an Editor of the Journal of Law and Economics. Judge Easterbrook continues to serve on the University of Chicago faculty and remains a prolific and influential writer.[98]

[98] See, e.g., Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. Chi. L. Rev. 1391 (1992)(hereinafter as "*Making a Difference*"), reviewing F. Easterbrook & D. Fischel, *The Economic Structure of Corporate Law* (1991), and suggesting that "[t]his may be the best book ever written about corporate law. 59 U. Chi. L. Rev. at 1392.

Because Judge Easterbrook is so creative, hard-working and dedicated, yet has in the Council's view very serious failings, the Council discusses its concerns at some length.[99]

Judge Easterbrook's Opinions.

Judge Easterbrook's opinions are generally insightful and often path-breaking. Indeed, Judge Easterbrook's reasoning has been adopted by subsequent federal judges facing similar issues. For example, Judge Easterbrook's dissent in International Union, UAW v. Johnson Controls Inc., 886 F.2d 871, 908-21 (7th Cir. 1989)(*en banc*)(Easterbrook, J., dissenting), rev'd, 499 U.S. 187 (1991), was subsequently adopted by the Supreme Court. Judge Easterbrook also has been commended by several attorneys for properly encouraging lower courts and members of the bar to return to certain basic "first principles" regarding obligations under Rule 11 of the Federal Rules of Civil Procedure, pleading requirements, jurisdictional predicates, and the proper role of discovery in civil litigation.

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[99] The Council was struck by the extensive influence exercised on the Court by two judges, Chief Judge Posner and Judge Easterbrook. Many of the strongest opinions of the other judges come in response to opinions by those two judges. Also, as we discussed above, their view of the appropriate function of an ap pellate judge - which is far more expansive than that of their colleagues - also has influenced our evaluation. Without those two judges, the entire Court would be a different, and much less interesting, place. This evaluation would certainly be different. For that reason, the discussion of those judges is somewhat longer than for most of their colleagues.

Judge Easterbrook is generally praised as being exceptionally smart (many say "brilliant"). He has a great knowledge of the law, is a clear writer, and produces opinions faster than any judge on the court. (Opinions authored by Judge Easterbrook are issued, on average, 67 days after argument, while the average for the Court is 141). He is well prepared for oral argument, and is, by all accounts, extremely hard working.

Nevertheless, the Council is deeply troubled that Judge Easterbrook appears less concerned about the actual facts and issues presented in the appeals before him than about advancing his own philosophy. Further, Judge Easterbrook communicates a lack of appreciation of the litigants as real human beings with real life problems. He also can communicate a lack of respect for the facts of each case, and for precedent. In addition, he has been resoundingly criticized for his poor judicial demeanor. Both at oral argument and in his writing, Judge Easterbrook displays a contempt for attorneys and, to some extent, the litigants as well.

There are several areas of law in which Judge Easterbrook has distinguished himself as the author of several of the Court's key decisions, such as attorney sanctions under both Rule 11 and under Rule 38 of the Federal Rules of Appellate Procedure.[100] Securities, corporate, and antitrust cases are other areas in which Judge Easterbrook has had a significant impact on the Court's jurisprudence.

100 Judge Easterbrook wrote the excellent *en banc* opinion for the Court in Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*), in which the Seventh Circuit adopted a highly deferential standard of review for Rule 11 sanctions. Both before and since Mars, Judge Easterbrook has written several very strong opinions making clear to the bar that the Court will not be reluctant to uphold or impose severe attorney sanctions (or even to recommend sanctions to the District Court on remand). See, e.g., Rose v. Franchetti, 979 F.2d 81 (7th Cir. 1992)(upholding a default judgment as a sanction for discovery non-compliance, even though neither a prior motion to compel had been filed nor an order compelling discovery had been entered); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 819 (7th Cir. 1987)(*sua sponte* suggesting that the complaint, which was not at issue on an appeal from summary judgment, violated Rule 11, and remanding the action to the District Court for the imposition of sanctions).

On occasion, Judge Easterbrook's colleagues have criticized him for perhaps being too aggressive on the issue of attorney sanctions. See, e.g. Skycom, 813 F.2d at 819-21 (Will, J., concurring in part and dissenting in part); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085-96 (7th Cir. 1987)(Cudahy, J., dissenting in part), cert. dismissed, 485 U.S. 901 (1988). Judge Easterbrook's aggressive approach to attorney sanctions, while certainly appropriate in some circumstances, has had two negative effects. First, it contributes to a chilling effect upon cutting-edge legal arguments by determining that certain propositions may be "objectively frivolous." See Judge Cudahy's dissent in Szabo Food Serv., 823 F.2d at 1086. Second, it has encouraged the growth of "a cottage industry" in sanction motions and appeals.

Judge Easterbrook has been praised for simultaneously writing clearly and creatively. He has written many strong, solid opinions that clearly articulate concerns. See, e.g., Hill v. Richardson, 7 F.3d 656 (7th Cir. 1993)(explaining why counsel for plaintiff who obtains desired relief by settlement in a § 1983 case is entitled to an award of fees); Guinan v. United States, 6 F.d 468, 473-76 (7th Cir. 1993)(Easterbrook, J., concurring)(discussing concerns related to timing of claim by criminal defendant of ineffective assistance of counsel); United States v. Springs, 988 F.2d 746 (7th Cir. 1993)(discussing District Judge's ability to modify sentence); In re Krynicki, 983 F2d 74 (7th Cir. 1992)(refusing to seal briefs, recognizing public's right to know); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992)(broad application of fair law to insure redlining), cert. denied, 113 S. Ct. 2335 (1993); In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992)(discussing intersection of CERCLA and bankruptcy law); Owens-Corning Fiberglas Corp. v. Moran, 959 F.2d 634 (7th Cir. 1992)(declining federal interference in state court proceeding). Another such example is Judge Easterbrook's recent opinion for the *en banc* Court in Todd v. Societe BIC, S.A., 9 F.3d 1216 (7th Cir. 1993)(*en banc*)(certifying product liabilities questions to the Illinois Supreme Court).[101] Whether or not one agrees with the result in Todd, Judge Easterbrook did an excellent job of fairly setting forth the applicable issues, and advancing their discussion.

101 The Illinois Supreme Court subsequently refused certification. See *Lighter case heads back to 7th Circuit*, Chi. Daily L. Bull. at 1 (Nov. 23, 1993).

Judge Easterbrook provides the reader with a clear road map through an opinion, and he can describe extremely difficult and complex legal issues in plain terms. Several attorneys applaud Judge Easterbrook's frequent use of evocative and colloquial language. For example, he described the uncertain state of the law governing the statute of limitations for judicially-created federal securities fraud actions as "one tottering parapet of a ramshackle edifice." Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987). In characterizing the state of mind required for liability for aiding and abetting violations of § 10(b) of the Securities Exchange Act of 1934, Judge Easterbrook did not adopt the typical legalese common to the cases in the area. Instead, he wrote that plaintiffs in such cases must establish that the defendant has "thrown in his lot with the primary violators" or gained by "bilking" investors or by trying to "feather their nest." Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986). See also Astor Chauffeured Limousine C. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1546 (7th Cir. 1990)(characterizing defendant's argument that its offering statements were "such obvious hooey that no reasonable investor would be taken in"). One attorney notes that such creative use of everyday language often make Judge Easterbrook's opinions a pleasure to read. Many attorneys question, however, whether Judge Easterbrook's examples sometimes go too far, feeling that some of his statements or examples appear smug or inappropriate.[102]

[102] See, e.g., United States v. Eaken, 995 F.2d 740, 745 (7th Cir. 1993)(Easterbrook, J., dissenting)("Eaken owes the United States a year of his life for failure to file his tax return for 1985"); id. at 743 n.3 (Judge Rovner's majority opinion disagrees with Judge Easterbrook's conclusion that one-year sentence would be given on remand if conviction were reversed); United States v. Finley, 934 F.2d 837, 840 (7th Cir. 1991)(explaining how a prosecutor may formulate a question, Judge Easterbrook used the example, "Did you tell me that in the evenings (defendant) is a female impersonator who fleeces customers in seedy bars?").

Judge Easterbrook has been very strict in applying procedural rules to defeat discussion on the merits. Many of the opinions discussed in the introduction at pp. 20-28 supra were authored by Judge Easterbrook. He has, for example, taken a very narrow view towards filing briefs late or exceeding page limits, see, e.g., EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082 (7th Cir. 1990)(Easterbrook, J., as motion judge); and amending complaints, see, e.g., Holstein v. Brill, 987 F.2d 1268 (7th Cir. 1993); O'Rourke v. Continental Casualty Co., 983 F.2d 94 (7th Cir. 1993). As discussed at pp. 25-28 above, this kind of blind adherence to the rules for their own sake too often sacrifices the litigant in multi-issue or multi-party cases with real needs for more time or space. Also, by discovering hitherto unsuspected barriers to finality and jurisdiction, he often has turned perfecting an appeal into a minefield for litigants and lower courts alike.

The Role of Economic Analysis in Judge Easterbrook's Opinions.

Judge Easterbrook has been perceived as selecting a result consistent with his views of economic efficiency and then working backwards, and often outside the record, to reach the result.[103] As a consequence, Judge Easterbrook's result in many cases appears to be based upon unproven factual assumptions or hypotheses not obtained from the record in the case, but instead from his own assumptions about how a market or a transaction should work, or similar economic analysis. This approach quite properly infuriates lawyers. It deprives them of a chance to prove their case, to brief the case law, and even to challenge the factual presentation of expert opinion (which Judge Easterbrook, in effect, unilaterally introduces into his opinion as extra-record, and hence unrebuttable "fact"). This problem is perhaps most prominent in Judge Easterbrook's opinions in significant corporate and securities cases.

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103 Judge Easterbrook has also frequently joined in such opinions written by Judge Posner. See, e.g., Rodi Yachts, Inc. v. National Marine, Inc., 984 F.2d 880 (7th Cir. 1993)(applying "cheapest cost avoider" approach to negligence, over criticism in concurrence by Judge Wood); Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992)(reversing grant of preliminary injunction over strong dissent by Judge Cudahy attacking economic analysis).

For example, in Flamm v. Eberstadt, 814 F.2d 1169, 1173-1174 (7th Cir.), cert. denied, 484 U.S. 853 (1987), Judge Easterbrook, after first citing a wealth of literature from the "Chicago school" of law and economics, concluded in accordance with his own law review article that since management's "silence pending settlement of ... a deal is beneficial to most investors, most of the time," the failure to disclose pending deals is immaterial as a matter of law and economic policy. See also Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611 (1985). Shortly thereafter, in Basic Inc. v. Levinson, 485 U.S. 224, 235 n.11 (1988), the Supreme Court expressly criticized Judge Easterbrook's opinion in Flamm for "[r]easoning backwards from a goal of economic efficiency" to achieve the result reached there.[104] The "benefit to investors" "fact" that Judge Easterbrook relied upon in Flamm was nowhere decided or even discussed in the record before him. Id. at 1177. Indeed, it is a "legislative," not an "adjudicative" fact, which under the statutory scheme is appropriately left to an administrative agency and not to a common law court, which lacks the hearing and fact-finding decisional process of an administrative agency.[105]

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[104] See also Wallace v. Robinson, 940 F.2d 243, 249 (7th Cir. 1991)(Cudahy, J., dissenting)("By artfully framing the question in this way, the en banc majority [through Judge Easterbrook] orchestrates its answer.")

[105] Influential judges have recently argued that articulation of clear, "bright-line" rules is preferable to fact-intensive distinctions. See *Cardozo*, supra note 46, at 107; Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182-83 (1989). A related effort is to identify a "default rule" for apparently incomplete contracts. See generally Ayres & Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L.J. 729 (1992); Ayres, *Making a Difference*, supra note 98. (For a recent example of an attempt by the Seventh Circuit to identify the appropriate "default" rules, compare the opinions of Judges Cudahy, Posner, and Easterbrook in Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.)(*en banc*), cert. denied, 114 S. Ct. 291 (1993)).

Another example is Judge Easterbrook's opinion in Kamen v. Kemper Fin. Servs., Inc., 908 F.3d 1338 (7th Cir. 1990), rev'd, 111 S. Ct. 1711 (1991). In Kamen, Judge Easterbrook confronted the narrow issue whether the District Court erred in dismissing a shareholder derivative action for failure to plead with sufficient particularity facts excusing "demand" on the board of directors. 111 S. Ct. at 1713. Rather than address that issue, however, Judge Easterbrook expressly overruled Seventh Circuit precedent holding that the issue was governed by state corporate law, and concluded that, as a matter of economic policy, the requirement of making "demand" should never be excused. 908 F.2d at 1343-1347. Judge Easterbrook justified his power to use economic policy to create a universal demand requirement by arguing that the issue of demand was governed by federal common law. Id. at 1342.[106]

The Supreme Court unanimously reversed Judge Easterbrook's opinion. Suggesting that Judge Easterbrook's decision was a call for "legal reform," the Supreme Court concluded that he had engaged in a "quantum of federal common lawmaking" that exceeds his power as a federal judge. 111 S. Ct. at 1720. The Supreme Court found Judge Easterbrook's refusal to accept the appellant's argument for the application of Maryland law particularly ironic given that neither party ever argued that federal common law should apply. 111 S. Ct. at 1718. Moreover, the Supreme Court chided Judge Easterbrook for writing an opinion that contains little more than elaborate dictum: "the court should

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106 Judge Easterbrook did circulate the opinion pursuant to Circuit Rule 40(f), and the Court approved the departure from its prior precedent.

refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided." 111 St. Ct. at 1718 n.5. According to the Supreme Court, Judge Easterbrook effectively had exploited the posture of the case and exceeded his power as a judge in order to create a federal law of universal demand consonant with his economic philosophy: "The Court of Appeals erred by fashioning a uniform federal common law rule ..." 111 S. Ct. at 1723.

Regrettably, Kamen and Flamm are merely two examples among many of this troublesome practice in the corporate and securities area. See, e.g., Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 515 (7th Cir. 1989)(employing efficient capital market hypothesis to limit securities fraud liability to the non-disclosure of "firm specific" information); Goldberg v. Household Bank, FSB, 890 F.2d 965, 966 (7th Cir. 1989)(using efficient market theory to limit measure of damages recoverable by victims of securities fraud); Jordan V. Duff & Phelps, Inc., 815 F.2d 429, 442 (7th Cir. 1987)(relying uponown theory of optimal damages in securities fraud cases to limit recovery to situations where investors as a whole suffer a net loss), cert. dismissed, 485 U.S. 901 (1988); Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1129-31 (7th Cir.)(employing efficient capital market hypothesis to reject theory of liability based on a fraud that "created" a market), petition for cert. filed, 62 U.S.L.W. 3393 (Nov. 18, 1993)(No. 93-827).

Nor are the cases in the securities field the only area in which Judge Easterbrook appears to rely in large part on assumptions about economic efficiency taken from outside the record. See, e.g., Merk v. Jewel Food Stores, 945 F.2d 889, 898-99 nn.3-4 (7th Cir. 1991)(majority criticizes Judge Easterbrook's dissent for relying on unsupported assertion about economic motives and for ignoring and mischaracterizing controlling precedent), cert. denied, 112 S. Ct. 1951 (1992). See also United States v. Mount, 966 F.2d 262 (7th Cir. 1992)(applying economic analysis to baseball).[107]

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[107] See also Kurland, *Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 Chi.[-]Kent L. Rev. 3, 7 (1991)(criticizing law and economics approach to the writ of *coram nobis* in United States v. Keane, 852 F.2d 199, 206 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989)); Kurland at 14-20 (discussing the willingness of Judges Easterbrook and Posner to go beyond Supreme Court precedent to advance their views in criminal cases); id. at 26-27 N.110 (discussing Brecht); Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 Iowa L. Rev. 503 (1991)(discussing Judge Easterbrook's opinion in Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990)).

Judge Easterbrook has also issued other "result-oriented" or "activist" opinions in areas not directly tied to economic efficiency, but in which he has a strong view as to a legal question presented. See, e.g., Watkins v. Blinzinger, 789 F.2d 474, 483-84 (7th Cir. 1986)(expanding Eleventh Amendment doctrine to limit Ex Parte Young and thereby limit many suits against states), cert. denied, 481 U.S. 1038 (1987). Cf. United States v. Sassi, 966 F.2d 283 (7th Cir.)(discussing which of the many prior opinions on the subject are the law of the Circuit, and which the Court can ignore), cert. denied, 113 S. Ct. 509 (1992).

One such area is attorneys' fee awards to prevailing plaintiffs under civil rights and other statutes. Judge Easterbrook has exhibited a willingness to overturn District Court fee awards that set attorneys' hourly rates based upon the prevailing market rates in the relevant legal community. Notwithstanding the "abuse of discretion" standard that is to be applied on appellate court review of fee awards, Judge Easterbrook freely reverses trial court determinations awarding fees based upon "market" hourly rates which vary from those the prevailing party's attorney typically charges for his or her services. Under Judge Easterbrook's analysis, "[l]awyers do not come from cookie cutters," and a lawyer with a usual hourly billing rate above or below the market rate in the community is presumptively entitled to that rate, and not to one devised by the court. Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993). See also Barrow v. Falck, 977 F.2d 1100, 1105-06 (7th Cir. 1992)(reversing and remanding with directions to lower the hourly rate allowed); Hessel v. O'Hearn, 977 F.2d 299 (7th Cir. 1992)(reversing and remanding with directions to increase the hourly rate allowed).

As applied to public interest attorneys, who choose to reduce their hourly billing rates for certain clients or causes, Judge Easterbrook has suggested in dictum, after mentioning Supreme Court holdings to the contrary, that "if ideology leads some lawyers to favor a particular clientele, and so reduces what these persons must pay for legal services, this is the market at work." Barrow v. Falck, 977 F.2d 1100, 1106 (7th Cir. 1992). In that same dictum, he asserts that "lawyers get consumption value out of working for certain clients," and compares the lower rates they charge to those charged by lawyers "who flock to Arizona for the desert air and scenery." The result of awarding higher hourly rates to such attorneys, he sarcastically concludes, is "a rare treat" psychic income they can spend."[108]

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[108] While the criticism expressed in this section suggests a judge committed principally to his own view of the law's development, the conclusion does not necessarily follow that Judge Easterbrook is consistently reaching results that are different from the trail courts or his colleagues. It should be noted that Judge Easterbrook authors only 8% of the Court's reversals, placing him, on a percentage basis, near the center of the Court in terms of the percentage of times in which he writes to reverse a District Court decision. Similarly, Judge Easterbrook dissents in only 6.32% of the cases on which he sits, placing him below the court average of 8.07% with respect to the number of dissents.

In addition to more traditional separate opinions, Judge Easterbrook wrote one unusual opinion in which he described himself as "dubitante." See National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 685 (7th Cir. 1990)(Easterbrook, J., dubitante), aff'd, 112 S. Ct. 2374 (1992), and a recent opinion that was neither concurring nor dissenting, Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 999 F.2d 291 (7th Cir. 1993)(Easterbrook, J.)("Statement .... respecting the suggestion of rehearing en banc")(calling for Supreme Court resolution of conflict between the circuits).

Judge Easterbrook's Approach to Issues Not Directly Presented by the Case.

Judge Easterbrook frequently includes in his opinions lengthy discussions of issues that are not directly presented by the case. See, e.g., Koch v. Stanard, 962 F.2d 605, 607-08 (7th Cir. 1992)(Flaum, J., concurring)(criticizing dicta); United States v. Bader, 956 F.2d 708, 709 (7th Cir. 1992). There are many opinions of which it could be said, in Judge Easterbrook's own words from Kerrigan v. American Orthodontics Corp., 960 F.2d 43, 46 (7th Cir. 1992): "All of this is no more than an interesting detour, however." See id., at 47-48 (Shadur, J., dissenting)(criticizing dicta in majority opinion). [109] The analyses in these and other cases, however, are so lengthy and detailed that they fall into a category well beyond mere dictum. It has been suggested by members of the Seventh Circuit and the United States Supreme Court that such analyses are inappropriate. The Council agrees. See, e.g., Basic, 485 U.S. at 235 (suggesting that in his effort to reach a result which "maximizes shareholder wealth," Judge Easterbrook had ignored the "narrow question" presented in Flamm).

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[109] Another example is Judge Easterbrook's opinion in Hrubec v. National R.R. Passenger Corp., 981 F.2d 962 (7th Cir. 1992). After reaching a result necessary to resolve the case, Judge Easterbrook states "Whether bad faith plays any role at all is a question we need not answer." 981 F.2d at 964. After that statement, however, Judge Easterbrook proceeds to discuss whether the Seventh Circuit may eventually adopt the Sixth Circuit's position on the issue. 981 F.2d at 964. Responding to Judge Easterbrook's conclusion that this Circuit was "not apt to follow" the Sixth Circuit's bad faith requirement, Judge Flaum concurred in the judgment in Hrubec, stating:

> Because the district court did not base its holding on bad faith, we have no need to review the issue ... Therefore, I believe we should await an appropriate case before addressing the issue, instead of reflecting on the likely outcome in this circuit.

As discussed at pp. 8-14 supra, substantive consideration of issues not properly before the Court is inconsistent with the Court's duty to give full and fair consideration to the trial court's resolution of an issue before it and to consider the litigant's presentations of the facts and law with respect to those issues. Cf. PSI Energy, Inc. v. Exxon Coal USA, Inc., 991 F.2d 1265, 1272 (7th Cir. 1993)("It would be inappropriate for us to address these questions without the benefit of the district court's views."). In addition, other litigants may have had issues properly presented by their cases foreclosed, without the issues ever being fully briefed and presented against the background of a full factual record in the Seventh Circuit.

Judge Easterbrook himself has acknowledged how the Court should act. In Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1328 (7th Cir. 1993), Judge Easterbrook wrote separately to criticize the majority's discussion of a qualified immunity issue that was unnecessary to the decision, since the Court found the defendants had committed no wrong. Judge Easterbrook wrote:

> [T]hese subjects lose their significance once we conclude, as we have, that the individual defendants respected Cornfield's constitutional rights. Having made the litigants' contentions irrelevant, we should withhold comment. Our views about these subjects are advisory - pertinent to some other case, perhaps, but inconsequential to this one. That the parties have mooted a subject that turns out to be irrelevant is neither reason nor authority for judicial exegesis on the matter.

Id. at 1328. the Council agrees.[110]

Judge Easterbrook has written further about the evils of reaching out to decide issues not before a court:

> I have also left out of the list [of praiseworthy qualities in judges] any praise for judges who seize the moment to write essays about issues the parties did not present. Just as parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a ground not presented denies the parties this autonomy and increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel.

Easterbrook, *Afterword: On Being a Commercial Court*, 65 Chi.[-]Kent L. Rev. 877, 880 (1989).

Despite this language, Judge Easterbrook is one of the Court's chief practitioners of reaching out to decide an issue that has not been briefed by the parties. See, for example, the Kamen, and Flamm cases, discussed above. He apparently does this to present his views of legal issues as soon as possible, and to preempt consideration of other viewpoints after briefing and argument.[111] In his willingness to reach out and decide issues not necessarily before the Court, he is an activist judge.

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[110] See note 10 supra.

[111] See, e.g., Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355 (7th Cir. 1992)(Cummings, J., concurring)(Judge Easterbrook's suggestion, not raised by the parties' briefs, that the Wisconsin statute at issue "probably is no longer law at all" was not raised by the parties and was unpersuasive.)

A recent example of reaching out to decide issues not before the Court is the opinion in Gacy v. Welborn, 994 F.2d 305 (7th Cir.), cert. denied, 114 S. Ct. 269 (1993), a case in which the notorious murderer John Wayne Gacy challenged the jury instructions that had been received during the sentencing phase of his trial. On appeal, Gacy's attorneys had requested that the Court remand the case so that Gacy could present to Judge Grady the same evidence that had recently persuaded Judge Aspen of the unconstitutionality of comparable instructions in United States ex rel. Free v. Peters, 806 F. Supp. 705 (N.D. ILL. 1992), vacated, 1993 U.S. Dist. LEXIS 5362 (N.D. Ill. Apr. 15, 1993). Because Gacy had not raised the evidence below (a study by the late University of Chicago professor Hans Zeisel), the state asked the Court to treat the subject as waived. After oral argument, the Court requested additional briefs on the issues raised by Free.

Judge Easterbrook neither remanded the matter, nor treated it as waived. Instead, he treated it as if it had been raised below, concluding that because prisoners cannot wage a series of collateral attacks, "it is best to consider all of the contentions he presses on us." Gacy, 994 F.2d at 309. To support this conclusion, Judge Easterbrook cited to the Supreme Court's admonition that capital appeals are to be resolved expeditiously, and concluded that "[b]oth Gacy and the State of Illinois are entitled to decision without indefinite delay." Id. Judge Easterbrook reached this conclusion even though the Zeisel study was not in the record before him, made up no part of the court's decision below (since that court had denied a motion to hear the evidence), and neither party had asked for a substantive resolution of the matter before the Court. Judge Easterbrook nevertheless pro-

vided a lengthy analysis, rejecting the conclusions reached in the Zeisel study and by Judge Aspen in Free. Gacy, 994 F.2d at 309-14. We believe the Court should have followed normal appellate practices and either found the issue waived or remanded it to the District Court.[112]

Judge Easterbrook's Use of Precedent and the Record.

In addition, Judge Easterbrook's opinions have been criticized for not accurately reflecting the record or controlling precedent. Several attorneys have gone as far as to state that Judge Easterbrook's use of precedent is unreliable and inappropriate. This position is supported by several opinions critical of Judge Easterbrook.

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112 It could be argued that Judge Easterbrook's panel was as in as good a position to decide the issues raised by the Zeisel study as any other panel, and that by requesting supplemental briefs all proper appellate procedures were honored; declining the issue at that time was the most efficient approach. That argument, however, ignores the damage done to the appellate process by depriving the District Court of the opportunity to consider the issues and gaining the benefit of a District Court decision on the facts of the case before it. In addition, it gives the appearance that the panel was reaching out to decide an issue that was not fully ripe for decision and otherwise would be decided by another, late panel.

One example of an opinion by Judge Easterbrook that was criticized as omitting controlling precedent is Will V. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986). In Will, Judge Easterbrook stated that a plaintiff alleging that the purchase of one product was illegally tied to a second product must show a danger of the seller obtaining market power or a potential monopoly in the market of the second, tied product. 776 F.2d at 673. Less than a year earlier, however, that position had been rejected by a 5-4 United States Supreme Court opinion in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). Judge Easterbrook was certainly aware of the position in Jefferson Hospital, as he had been counsel to Jefferson Hospital in that case before the Supreme Court. In a subsequent opinion by Judge Cudahy, joined by Chief Judge Bauer and Judge Ripple, in Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 716-19 (7th Cir. 1987), the Court noted that Judge Easterbrook's prior opinion in Will "apparently misstates the law."

It is not unusual for Judge Easterbrook to refer in a later opinion to his own extensive and free-wheeling dicta as either controlling precedent or creating an open question when the issue that he has foreshadowed actually does present itself in a case before him. For example, by the time he wrote Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F2d 1540 (7th Cir. 1990), Judge Easterbrook concluded - based in large part on his own prior expansively written opinions in Flamm and Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522 (7th Cir. 1985), as well as the opinions of other federal judges following his lead in those cases - that "justifiable reliance is not an independent element in securities litigation." Id. at 1546 (emphasis in original)(citations omitted).

In United States v. Chaidez, 919 F.2d 1193 (7th Cir. 1990), Cert. denied, 111 S. Ct. 2861, 112 S. Ct. 209 (1991), for example, Judge Easterbrook asserted that "[t]he standard of review for the conclusion that the seizures were reasonable ... is in transition in this circuit. Several cases hold that review is *de novo* [citing cases]. Recently doubts have been expressed [citing dicta from his own concurrence (joined by Judge Posner) in United States v. Malin, 908 F.2d 163, 169-70 (7th Cir.), 498 U.S. 991 (1990)]." Chaidez, 919 F.2d at 1196.

Judge Ripple would have none of it:

> I agree with the panel majority that, under the law of this circuit, our review is *de novo*. I do not know what the panel majority means when it says that the governing law "is in transition." Under the doctrines of precedent and *stare decisis*, this court applies established principles unless and until the full court determines that our former course was erroneous. This disagreement of a particular judge or even several judges, [citing Judge Easterbrook's and Posner's Malin concurrence], hardly justifies an announcement to bench and bar that well-settled principles may no longer control. Such a pronouncement is both premature and presumptuous.

Chaidez, 919 F.2d at 1203 n.1 (Ripple, J., dissenting) (citations omitted).[113]

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113 See also Rakestraw v. United Airlines, Inc., 989 F.2d 944, 945-48 (7th Cir. 1993)(Ripple, J., dissenting from denial of rehearing *en banc*)(asserting that Judge Easterbrook misread Supreme Court case).

Judge Easterbrook has also been criticized for mischaracterizing the record below in order to reach certain results.[114] The Council received this complaint from attorneys, and it was recently made by Judge Cummings. See Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355, 365 (7th Cir. 1992)(Cummings, J., concurring)(criticizing Judge Easterbrook's dissenting opinion). In Wilcox a diversity case, Judge Cummings wrote that

> the dissent's mischaracterization of the facts, misstatement of public policy at issue, and misapplication of Wisconsin precedent compels me to write a brief response .... It is striking how little this imagined scenario [set forth by Judge Easterbrook] resembles the actual facts presented in the parties stipulated joint appendix.

Id. at 365.[115]

In still other cases, particularly criminal cases, Judge Easterbrook is willing to assume facts that are not part of the record in order to support the conclusion he wishes to reach. For example, in United States v. Mosley, 967 F.2d 242, 243-44 (7th Cir. 1992) Judge Easterbrook dismissed an appeal because he found three hypothetical reasons why the appeal was not filed on time and the most likely possibility did not suggest ineffective assistance of counsel. In United States v. Ferra, 948 F.2d 352, 354 (7th Cir. 1991), cert. denied, 112 S. Ct. 1939 (1992), Judge Easterbrook upheld a sentence based on what Judge Cudahy's dissent described as an "unimaginable" assumption. Although the police con-

114 For a condemnation of this practice, see *Cardozo*, supra note 46 at 55.

115 See also Weinstein v. University of Illinois, 811 F.2d 1091, 1098-99 (7th Cir. 1987)(Cudahy, J., dissenting)(criticizing majority's mischaracterizations of issues on the merits).

fiscated only 254 grams of cocaine, Easterbrook accepted the trial court's sentence based on a weight of over 500 grams. The trial court extrapolated from the amount confiscated to over 500 grams based on testimony that Ferra had given 1/16th of an ounce of cocaine to an informant in each of 200 "fencing" transactions. Even though this assumption required the informant to commit more than one robbery per day, Judge Easterbrook upheld the finding because "some burglars are hyperactive." See also United States v. Widgery, 778 F.2d 325, 331 (7th Cir. 1985)(Judge Cudahy's dissent attacks Judge Easterbrook's conclusion that jurors were not prejudiced by inappropriate communications during deliberation as "speculation")' Gacy, 994 F.2d at 308 (speculates that the "question at hand probably did not arise in the jury's deliberations; they must have been in agreement from the outset").

Judge Easterbrook's Judicial Demeanor.

Judge Easterbrook has consistently displayed a temperament that is improper for a Circuit Judge. While Judge Easterbrook has many good qualities, there is a widespread belief that he is arrogant and intolerant with those who do not match his own intellectual level. This problem seriously interferes with the performance of his duties.

Judge Easterbrook has been resoundingly and repeatedly criticized as being extremely rude to attorneys at oral argument. Lawyers report that Judge Easterbrook goes well beyond asking pointed ques ions; rather, he "attacks" lawyers in an attempt to establish that the advocate has not understood the case or that the judge's knowledge is superior to the advocate's. Such behavior often continues well after the judge has made the point to be established. Judge Easterbrook has gone so far as to cause attorneys to break down, unable to continue effectively. Even attorneys who

otherwise praised Judge Easterbrook expressed concern about his judicial demeanor. Unfortunately, some attorneys reported that as a result of the judge's demeanor, attorneys and their clients "rarely feel like they have received a fair hearing."

The tone of Judge Easterbrook's opinions can be particularly harsh, especially in cases in which he is dissatisfied with counsel's conduct. In Kale v. Obuchowski, 985 F.2d 360, 362-64 (7th Cir. 1993), he assessed a litigant's argument on appeal as "pettifoggery," and concluded: "Appellants have other arguments, but displaying them would do little more than illustrate why some members of the public believe that 'shyster' and 'lawyer' are synonymous. This is a frivolous, doomed and sanctionable appeal." Regardless of whether the attorney's conduct in Kale merited sanctions, the language chosen does not enhance the administration of justice.[116]

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116 In addition, the issuance of what is, in effect, a published reprimand, without benefit of notice and an opportunity to be heard, violates the spirit, if not the letter, of Circuit Rule 38. See pp. 22-24 supra.

Conclusion.

Judge Easterbrook's performance is divided between the extremes. In some respects he is excellent; in some he is subject to the most severe criticism. His talents should make him one of the great judges in the country, and sometimes he is. He is a brilliant and provocative thinker who is hard working and has full control of his docket. But other qualities are required of judges. All too often, particularly when he disregards the facts or the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and his diversions from the facts and the law.

It is regrettable that Judge Easterbrook's failings prevent the Court and the legal community from gaining the full advantage of his abilities.